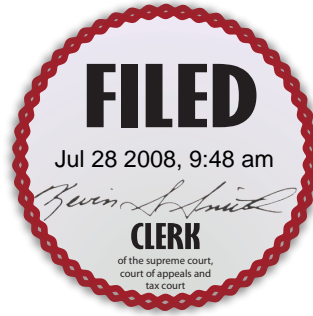


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

R. PATRICK MAGRATH
Alcorn Goering & Sage, LLP
Madison, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

IAN McLEAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN G. POLING,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 78A01-0801-CR-22

APPEAL FROM THE SWITZERLAND SUPERIOR COURT
The Honorable John D. Mitchell, Judge
Cause No. 78D01-0310-FD-467

July 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Steven G. Poling appeals the trial court's order that he pay restitution of \$23,365.71 to Clarence Austin. We affirm.¹

Issues

Poling raises one issue on appeal, which we re-state as:

- I. Whether the trial court had jurisdiction to order Poling to make restitution to Austin, in an amount to be determined subsequent to sentencing; and
- II. Whether there was sufficient evidence to support the trial court's restitution order.

Facts and Procedural History

On October 26, 2003, Poling broke into Austin's home and beat him severely, causing multiple injuries, including fractured ribs and three vertebrae. The next day, the State charged Poling with Residential Entry, two counts of Battery Resulting in Bodily Injury (Austin and another), and Criminal Mischief. Austin sued Poling for damages and Poling filed for bankruptcy.

On June 12, 2006, the State and Poling filed a "Joint Motion in Tender of Conditional Negotiated Plea" ("Agreement"), concerning three different criminal causes.² Appendix at 75. Pursuant to the Agreement, the State dismissed most of the charges, and Poling pled guilty to: Residential Entry and Battery Resulting in Bodily Injury in the instant cause, as well as another battery. The Agreement left the sentence for the three convictions to be

¹ The Pre-Sentence Investigation Report should appear on green paper. See Ind. Appellate Rule 9(J); Ind. Trial Rule 5(G); and Ind. Administrative Rule 9(G)(1)(b)(viii).

determined by the trial court. The Agreement provided as follows, including omissions where noted:

Defendant shall be on supervised/unsupervised probation for a period of _____, which probation shall not be revoked nor any suspended penalty imposed, on the conditions that the Defendant[:]

. . .

make restitution for _____ in the amount of \$ _____ by _____.

pay the fine, costs, probation user's fee and restitution to the Switzerland County Probation Department in monthly installments of \$ _____/month.

Appendix at 75.

It appears that the existence of multiple matters in multiple courts – Austin's civil action, Poling's bankruptcy, and the instant prosecution – made resolving restitution to Austin somewhat procedurally complex. On August 14, 2006, the trial court accepted the Agreement and entered judgment of conviction on the three charges to which Poling pled guilty. The trial court found that:

5. Civil litigation is now pending which arose out of the circumstances of this case as between the Defendant and said Clarence Austin; [and]
6. The Defendant should be required to pay restitution in the amount of any civil judgment which may be entered as a result of said judgment.

[and ordered that:]

4. Defendant shall be on probation for a period of One (1) year upon the conditions that Defendant . . . (e) pay restitution to Clarence D. Austin, II in an amount which will be determined by litigation now pending.

² The Joint Motion addressed 78D01-0310-FD-467 (the instant cause), 78D01-0401-CM-4, and 78D01-0508-FD-311.

Appendix at 140.

On November 22, 2006, the Bankruptcy Court allowed Austin's claim. Poling moved to dismiss the State's request for restitution. The trial court denied Poling's motion and found that he should make restitution to Austin for lost wages, medical bills, and drug costs totaling \$23,365.71. Poling now appeals the trial court's restitution order.

Discussion and Decision

I. Trial Court Authority

Poling argues that the trial court lacked jurisdiction to order the precise amount of restitution at any time other than sentencing. As a condition of probation, a trial court may order a person to make restitution to the victim. Ind. Code § 35-38-2-2.3(a)(5). The trial court shall fix the amount. Id. A trial court enjoys wide latitude in fashioning the terms of probation. Bailey v. State, 717 N.E.2d 1, 4 (Ind. 1999). We review probation orders for an abuse of discretion. Id.

As an initial matter, we note that Poling did not appeal the sentencing order of August 14, 2006. At that time, the trial court ordered Poling "to pay restitution in the amount of any civil judgment which may be entered as a result of said judgment." App. at 140. One of the conditions of his probation was that he "pay restitution to [Austin] in an amount which will be determined by litigation now pending." Id. Poling had thirty days from August 14, 2006 to challenge the trial court's sentencing order. He did not. Therefore, this argument is waived. See Ind. Appellate Rule 9(A); In re Estate of Hester, 780 N.E.2d 848, 849 (Ind. Ct. App. 2002), trans. denied.

Waiver notwithstanding, our Supreme Court has upheld the determination of a precise restitution amount after the issuance of a sentencing order. Bailey, 717 N.E.2d at 4. In Bailey, the sentencing order provided for the defendant's restitution to be determined at the commencement of probation. The Bailey Court allowed that process, so long as the trial court was the entity fixing the amount of restitution. Here, the trial court conducted an evidentiary hearing and made findings, discussed below, regarding lost income and medical expenses.³ The trial court did not abuse its discretion in fashioning its restitution order.

II. Sufficient Evidence of Damages

Alternatively, Poling argues that there was not sufficient evidence to support the trial court's order. We will affirm the trial court's decision if there is any evidence supporting the decision. Shane v. State, 769 N.E.2d 1195, 1199 (Ind. Ct. App. 2002).

Austin testified that, while he was asleep one night, Poling broke down an exterior door, entered Austin's bedroom, and beat him. "It seemed like it went on forever. I ended up with broken ribs, fractured all three vertebrae on both sides, several cuts, bruises, a lot of things like that, a lot of swelling." Transcript at 24. He is in pain at all times. His injuries caused him to miss fifty-two days of work and to transfer to a slightly lower paying job (\$21.63/hour) because he cannot stand still for extended periods. Austin testified that his lost wages amounted to \$8,998.08.⁴

³ In a related argument, Poling argues that the trial court abused its discretion, in issuing its sentencing order, by allowing civil litigation to fix the amount of restitution. Ultimately, however, the trial court itself conducted the fact-finding and thereby complied with the statutory requirement that it fix the amount of restitution.

⁴ (52 days X 8 hours/day X \$21.63/hour = \$8,998.08)

A report of Dr. Scott M. Frede indicated that Austin suffered three broken ribs and degenerative disc disease at L3-4 and L4-5 as a result of the incident. There was evidence that Austin's medical and pharmaceutical costs amounted to \$14,367.63. Accordingly, there was sufficient evidence to support the trial court's order that Poling pay Austin \$23,365.71 in restitution.⁵

Conclusion

The trial court had jurisdiction to fix the amount of restitution after issuing its sentencing order. There was sufficient evidence to support the trial court's restitution order.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

⁵ (\$8,998.08 + \$14,367.63 = \$23,365.71)